**AZMAN ZAIN AHMED MOHD ZIN** A

**v.**

**CIMB BANK BHD**

HIGH COURT MALAYA, KUALA LUMPUR B
MARY LIM J
[BANKRUPTCY NO: D29-5454-2009]
17 APRIL 2012

***BANKRUPTCY:*** *Adjudication and receiving orders - Appeal against - Preliminary objections - Sanction of Official Assignee/Director of Insolvency - Whether procured - Whether judgment debtor procured sanction of Official Assignee/Director of Insolvency to maintain action - Whether judgment debtor required to file mandatory pre-requisite documents under s. 3(2)(ii) Bankruptcy Act 1967 and rr. 18 and 117 Bankruptcy Rules 1969 - Judgment debtor's notice of intention to oppose petition struck out - Whether judgment debtor ought to have appealed against striking out of notice of intention to oppose petition instead of filing present appeal - Bankruptcy Act 1967, s. 92* C D

***BANKRUPTCY:*** *Notice - Name of judgment debtor - Name appearing in bankruptcy notice and creditor's petition not same as that appearing in judgment in default - Whether name of intended bankrupt absolutely vital - Whether mistake in name negated act of bankruptcy - Bankruptcy Act 1967, ss. 3(2)(ii), 38 & 92 - Bankruptcy Rules 1969, rr. 18 & 117* E F

The judgment creditor ('JC') had obtained a judgment in default of appearance against the judgment debtor ('JD') and subsequently issued a bankruptcy notice against the JD. When the JD did not settle the sum owed, a creditor's petition was then presented. The JD served a notice of intention to oppose the petition which was struck out by the Senior Assistant Registrar ('SAR'). The JC then proceeded to serve the creditor's petition and when it came up for hearing, the representative from the official assignee's office brought to the court's attention, the matter of a discrepancy in the name of the JD. It transpired that the name appearing in the creditor's petition was not the same as that appearing in the judgment procured from the Sessions Court. However, the JD's attempt to raise an objection on the ground of error in the name of the JD was disallowed and the SAR entered an adjudication order and a receiving order against the JD. Thus, the JD appealed. At the hearing of the said appeal, the JC raised these G H I

preliminary objections, *ie*, (i) that the JD had not procured the sanction of the Official Assignee/Director of Insolvency under s. 38 of the Bankruptcy Act 1967 before maintaining this action; (ii) that the JD had not filed the mandatory pre-requisite documents under s. 3(2)(ii) of the Bankruptcy Act 1967 and rr. 18 and 117 of the Bankruptcy Rules 1969; and (iii) that the JD ought to have proceeded to appeal against the striking out of the notice of intention to oppose the creditor's petition instead of taking the present approach. Hence, the JC argued that the non-compliance of the mandatory provisions rendered the appeal totally defective. The JD, however, argued that this was an appeal against the orders adjudicating the debtor as a bankrupt and under such circumstances, s. 38 did not apply. The JD further contended that the appeal ought to be allowed because the bankruptcy notice upon which the creditor's petition was founded was clearly defective as the name of the JD, although correct here, was not the same as that appearing in the default judgment attached and that being so, it could not be said that the JD had committed an act of bankruptcy.

**Held (allowing the appeal; setting aside adjudication and receiving orders):**

**(1)** Since s. 38 of the Bankruptcy Act 1967 does not specify the particular format of the sanction, though generally it is in writing, the sanction can take many forms. By the attendance of the representative of the Official Assignee/Director of Insolvency, it may also be readily inferred that there was that requisite sanction. Further, the representative of the Official Assignee/Director of Insolvency had also informed the court that it took the position that no sanction was required and the appeal was supported by the Official Assignee/Director of Insolvency. Thus, the matter of the non-procurement of the sanction, therefore, did not arise. (paras 10 & 11)

**(2)** The provisions under s. 3(2)(ii) of the Bankruptcy Act 1967 and rr. 18 and 117 of the Bankruptcy Rules 1969 did not apply. Section 3(2)(ii) of the Bankruptcy Act 1967 deals with the situation where the JD disputes the validity of the notice on the ground of mistake on the amounts specified. Since this was not the basis of challenge, the contention on non-compliance of the provisions was irrelevant. (para 12)

**(3)** The JC's argument, that the JD ought to have proceeded to appeal against the striking out of the notice of intention to oppose the creditor's petition instead of taking the present approach, may have had merit if the JD was relying on the same ground of opposition. But, it was not. This ground concerned the disparity in the JD's name and was not the basis in the said notice. This appeal was provided under s. 92 of the Bankruptcy Act 1967 and had been properly taken. (para 13)

**(4)** The name in the judgment read as "Azman Zain Ahmed" whereas the name that appeared in the bankruptcy notice and the creditor's petition read as "Azman Zain Ahmed bin Mohd Zain". Although the bankruptcy notice was correct in this respect, it relied on a judgment that did not compliment it. It is the name of the intended bankrupt that is absolutely vital, more so when the exercise spells or questions the person's financial integrity and the failure to settle, culminates in the person being adjudicated and declared a bankrupt, unable to readily engage in trade, hold many offices or posts, and with restrictions in his movement. The person's name is important and significant as it identifies the person responsible for committing an act of bankruptcy which leads to the adjudication of the person as a bankrupt. (paras 14, 15 & 17)

**(5)** The name of the JD in the default judgment before the Sessions Court was clearly different from that of the JD now present before the court. Thus, it could not be readily and safely said that the JD had committed an act of bankruptcy by not abiding by the default judgment. Further, the Official Assignee/Director of Insolvency took the position that the order of the Sessions Court must be amended to reflect the correct person. (paras 18 & 19)

**Case(s) referred to:**

*Ho Ken Seng v. Progressive Insurance Sdn Bhd [2013] 1 CLJ 518 CA* ***(refd)***

*Re Mohd Zuhri Mohd Idris; Ex p Bumiputra-Commerce Bank Bhd [2010] 1 CLJ 786 HC* ***(refd)***

*Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Mohd Hashim [2000] 2 CLJ 535 HC* ***(dist)***

**Legislation referred to:**

Bankruptcy Act 1967, ss. 3(2)(ii), 38(1)(a), 92(1), (2), (3)

Bankruptcy Rules 1969, rr. 18, 117

A *For the judgment debtor - Manoharan Malayalam; M/s M Manoharan & Co*
*For the judgment creditor - Thirunavakarasu Vijayan Ganasen; M/s Shaw & Co*
*For the Insolvency Department - Siti Nor Nadirah Bahsan (Halim Shah Ali with her); FCs*

B *Reported by Suhainah Wahiduddin*

**JUDGMENT**

C **Mary Lim J:**

**Material Facts**

**[1]** On 20 December 2005, the judgment creditor obtained a judgment in default of appearance against the judgment debtor for the sum of RM58,663.71 before the Sessions Court at Kuala Lumpur (Summons No: 5-52-10811-2005).

**[2]** On 29 December 2009, the judgment creditor issued a bankruptcy notice against the judgment debtor. That notice was finally served by way of a substituted service. When the judgment debtor did not settle, a creditor's petition was then presented on 2 February 2011. This petition was served also by way of substituted service.

**[3]** On 15 April 2011, the judgment debtor served a notice of intention to oppose the petition. This notice was struck out on 19 April 2011 by the learned SAR.

**[4]** The judgment creditor next proceeded to serve the creditor's petition. It, too, was served by way of a substituted service. On 10 January 2012, when the creditor's petition first came up for hearing, the representative from the official assignee's office brought to the court's attention the matter of a discrepancy in the name of the judgment debtor. It transpired that the name appearing in the creditor's petition was not the same as that appearing in the judgment procured from the Sessions Court. Relying on the details in the identification card as given in both documents being the same, the solicitors for the judgment creditor contended that the two names actually referred to the same person, that is, the judgment debtor. Learned counsel then sought an adjournment in order to conduct a search and produce the

results of the search. At this point, apparently the solicitors for the judgment debtor attempted to raise an objection on the ground of error in the name of the judgment debtor. This was disallowed. In any case, the hearing of the creditor's petition was postponed to 13 January 2012. On that date, after hearing parties, the learned SAR entered an adjudication order and a receiving order against the judgment debtor.

## Objections

**[5]** The present appeal pertains to those orders made. At the hearing of this appeal, the judgment creditor raised the following preliminary objections:

(i) That the judgment debtor had not procured the sanction of the Official Assignee/Director of Insolvency under s. 38 of the Bankruptcy Act 1967 before maintaining this action;

(ii) That the judgment debtor had not filed the mandatory prerequisite documents under s. 3(2)(ii) of the Bankruptcy Act 1967, and rr. 18 and 117 of the Bankruptcy Rules 1969;

(iii) That the judgment debtor ought to have proceeded to appeal against the striking out of the notice of intention to oppose the creditor's petition instead of taking the present approach.

**[6]** Learned counsel for the judgment creditor further argued that the non-compliance of these mandatory provisions render the appeal totally defective. The non-compliance of these mandatory provisions also meant that the judgment creditor was not in the position to know the precise reasons or grounds for the judgment debtor's opposition to the petition.

**[7]** In response, learned counsel for the judgment debtor argued that this is an appeal against the orders adjudicating the debtor as a bankrupt. Under such circumstances, s. 38 does not apply. He further contended that the appeal ought to be allowed because the bankruptcy notice upon which the creditor's petition was founded was clearly defective as the name of the judgment debtor, although correct here was not the same as that appearing in the default judgment attached. That being so, it could not be said that the judgment debtor had committed an act of bankruptcy.

## Findings

**[8]** After carefully considering the arguments of both learned counsel and after examining the relevant documents, I am of the view that there is no basis to the preliminary objections raised.

**[9]** Dealing first with the matter of the sanction of the Official Assignee/Director of Insolvency under s. 38 of the Bankruptcy Act 1967. In *Ho Ken Seng v. Progressive Insurance Sdn Bhd* [2013] 1 CLJ 518; [2012] 1 MLJ 297, the Court of Appeal recently decided that s. 38(1)(a) was invoked even where the bankrupt was applying to set aside the bankruptcy notice, the adjudication and receiving orders as well as the related proceedings in rejecting the argument that the bankrupt was not maintaining an action in such a situation, the Court of Appeal was of the opinion that upon a true construction of ss. 38(1)(a) and 92(1), (2) and (3) of the Bankruptcy Act 1967, the sanction was required. It further held that the prosecuting of an appeal by the bankrupt came within the ambit of maintaining an action to which the sanction of the Official Assignee/Director of Insolvency was a requisite.

**[10]** On this issue, I am of the view that this actually does not arise because of the attendance of the Official Assignee or Director of Insolvency in these proceedings. The representative of the Official Assignee or Director of Insolvency has also informed the court that the Official Assignee/Director of Insolvency takes the position that no sanction is required. Further, the appeal is supported by the Official Assignee/Director of Insolvency.

**[11]** Since s. 38 has not specified the particular format of the sanction, though generally it is in writing, the sanction can take many forms. It is my judgment that the presence of the Official Assignee/Director of Insolvency today suffices. By the attendance of the representative of the Official Assignee/Director of Insolvency, it may also be readily inferred that there is that requisite sanction. That being so, the matter of the non-procurement of the sanction therefore, does not arise.

**[12]** Moving next to the matter of the non-compliance of s. 3(2)(ii) of the Bankruptcy Act 1967, and rr. 18 and 117 of the Bankruptcy Rules 1969. Having examined those provisions, I find that these provisions do not apply. Section 3(2)(ii) deals with the situation where the judgment debtor disputes the validity of the notice on the ground of mistake on the amounts specified. Since this is not the basis of challenge, this contention is irrelevant.

**[13]** On the matter of the exhaustion of appeal of the striking out of the notice of intention to oppose the creditor's petition, again, I do not find merit in this argument. The Bankruptcy Act 1967 provides many avenues of challenges in the process towards adjudicating an individual as a bankrupt. The argument of the judgment creditor may have had merit if the judgment debtor was relying on the same ground of opposition. But, it is not. This ground concerns the disparity in the judgment debtor's name. This was not the basis in the notice. This appeal is provided under s. 92 of the Bankruptcy Act 1967 and I am of the opinion that it is properly taken.

**[14]** Lastly, and finally on the basis of the appeal itself. It is the contention of the judgment debtor that the bankruptcy notice is defective because it is founded on a default judgment which does not bear the same name as his. The name in the judgment reads as "Azman Zain Ahmed" whereas the name that appears in the bankruptcy notice and the creditor's petition read as "Azman Zain Ahmed bin Mohd Zain". In response, the judgment creditor's argument is that since the identification card details in the two documents are the same, there is no error and no one is misled. The bankruptcy notice is therefore valid and the appeal should be dismissed.

**[15]** This is my view. Although the bankruptcy notice is correct in this respect, it relies on a judgment that does not compliment it. I am aware that it is not the function of the bankruptcy court to question the propriety of the judgment procured. These proceedings cannot be used to launch a collateral attack at the judgment upon which the bankruptcy notice is founded. Be that as it may, the issue is whether an act of bankruptcy has been committed in the circumstances of this case.

**[16]** With respect, the answer must be in the negative.

**[17]** I have expressed the importance of a person's name before in the case of *Re Mohd Zuhri Mohd Idris; Ex p Bumiputra-Commerce Bank Bhd* [2010] 1 CLJ 786. I see no reason to depart from the views then subscribed. Although the identification card details may be the same, it is the name of the intended bankrupt that is absolutely vital. The identification card details merely assist to identify the person, especially where there may be two persons bearing exactly the same name. Although that is not the case here, I cannot over-emphasise the importance and significance in a

person's name. More so, when the exercise spells or questions the person's financial integrity and the failure to settle, culminates in the person being adjudicated and declared a bankrupt, unable to readily engage in trade, hold many offices or posts, and with restrictions in his movement. This becomes even more significant when one is dealing with the name of a Malay gentleman in Malaysia. It is the proper and correct way to state his full name by reference to his given name and the name of his father. A person's name endows the person with the first and last identification. Identification card details are of relevance and assistance where there is, perhaps two persons with exactly the same name. In fact, there may be the occasion where the debtor does not even have an identification card number. The person's name is therefore, most vital as it identifies the person responsible for committing an act of bankruptcy which leads to the adjudication of the person as a bankrupt.

**[18]** The name of the judgment debtor in the default judgment before the Sessions Court is clearly different from that of the judgment debtor now present before me. Given that the judgment is a default judgment procured upon substituted service of the summons, a situation quite different from those presented in the case of *Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Mohd Hashim* [2000] 2 CLJ 535; [2000] 5 MLJ 430; it cannot be safely said that an act of bankruptcy has been deemed committed by this judgment debtor. In other words, it cannot be readily and safely said that the judgment debtor here, Azman Zain Ahmed bin Mohd Zain, has committed an act of bankruptcy by not abiding by the default judgment entered against Azman Zain Ahmed.

**[19]** I record that the Official Assignee/Director of Insolvency has no objections to this appeal. In fact, the Official Assignee/Director of Insolvency supports this appeal and takes the position that the order of the Sessions Court must be amended to reflect the correct person. Bearing in mind that it was the Official Assignee/Director of Insolvency who raised this matter in the first place, this stand is proper and consistent.

**[20]** In the circumstances, the appeal is allowed and the adjudication and receiving orders are hereby set aside with costs to the judgment debtor. The parties have proposed the sum of RM5,000 as suitable costs and I agree.